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1871

### With Some Considerations Regarding the Study of the Law

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## PREFACE:

WITH SOME CONSIDERATIONS REGARDING THE STUDY OF THE LAW.

THE Commentaries of Mr. Justice Blackstone have now for more than a century been the wonder and delight of persons whose curiosity or interest have led them to investigate the constitution and laws of Great Britain, the condition of things from which they grew, and the reasons upon which they rest. Lapse of time does not seem to diminish their attractions, or to lessen materially their practical value. Large as is the proportion of the rules and usages here defined and described which have been modified by statute, or have become obsolete in the changes of habits and modes of thought among the people, the best book in which to take a comprehensive view of the rudiments of English and American law is still the work now before us of this eminent jurist. It is true that of late many short and easy highways to a knowledge of the law have been planned by different writers, along which the student might saunter with little hard labor and less hard thought, arriving at his goal at last with a vague impression of having surveyed a vast field of curious and irreconcilable contradictions, where confusion was the leading principle, and chance the arbiter of controversy; but the thoughtful student, the earnest seeker after knowledge, ambitious to fit himself for the practical duties of life, and for the stations to which the partiality or discernment of his fellows might summon him, has shunned these deceptive ways, and by the aid of vigorous thinkers, like the author before us, has delighted to trace the plain law running through the apparent confusion, and to discover and contemplate the sound reasons out of which rules apparently arbitrary have sprung. Such minds soon perceive that the field of legal knowledge is too vast and diversified to be understood from a superficial survey of its principal objects and features, and that it must be carefully explored through all its mazes and intricacies, and with the aid of the men who, having studied the law with an intimate knowledge of the habits and customs of the people over whom it was established, were prepared to say why this rule was prescribed, and how and under what circumstances that custom sprung up. And so it happens, that while year by year hundreds of superficial workers are preparing themselves to glean in the fields of legal controversy, the true laborers in that field, the men who are to reap its substantial harvests, and to bear away its tempting prizes, do not spare themselves the labor of an intimate acquaintance with the work of this great jurist, nor fail to explore the abundant stores of legal learning to which he gives us such agreeable introduction.

Nor, although there are many things in Blackstone which have ceased to be important in the practical administration of the law, can we prudently or properly omit to make ourselves acquainted with them. Things which are abolished or obsolete may, nevertheless, have furnished the reasons for the things which remain: and to study rules while ignoring their reasons would be like studying the animal anatomy while ignoring the principle of life which animated it. And it is noticeable, also, that though in England, where the common law and the

statutes mentioned by this author have been so greatly changed by recent legislation, new works adapted to the present condition of things may, to a considerable extent, supersede the one before us, in America where many of these changes have never been made, and where much of the recent English legislation has no importance, even by way of explanation or illustration, the original work of Blackstone is much the most useful, as presenting us the law in something near the condition in which our ancestors brought it to America, leaving us to trace in our statutes and decisions its subsequent changes here, unembarrassed by irrelevant information about parliamentary legislation which in no way concerns us.

In the preparation of the present edition it has not been thought unimportant to call attention from time to time to the differences which exist between the constitutions of Great Britain and of the United States. Some of those differences, however, are too subtle to be put upon paper, and spring from differences in society which are sensibly felt but difficult of description. To speak of the one government as monarchical and the other as republican is naturally to convey the idea that in the one the element of executive strength and power is predominant, while in the other the influence of the people in the government is more direct and controlling; and the student of politics, who comes to this subject without previous familiarity with English constitutional history, is apt to be surprised when he finds that the personal influence and authority of the American Executive is much the most potent, and that while the popular branch of the American legislature is at most but the peer of the upper, the commons house of parliament lays down the law for both the monarch and the house of lords, permitting neither of those branches of the legislative department to oppose its settled determinations. But it would be idle from thence to draw general conclusions, unless we go beyond the theory of the British constitution, and take into consideration the aristocratic nature of British society, and that strong conservative sentiment and tendency which preserves to the privileged classes the real control of the government, notwithstanding the house of the legislature, which nominally represents them, has been stripped in a measure of its power, and the government brought into more intimate sympathy with the prevailing popular sentiment. We cannot understand a political system, and judge of its value and probable influence and permanency, without a knowledge of the people who have adopted it, and of the manner in which they are likely to give its theories practical effect; for nothing is more evident than that what will conduct one people to ruin, may lead another, which has had a different history and training, and whose natural and acquired tendencies are different, on the high road to national greatness and prosperity. The necessity of checks and balances in government, and of a careful distribution of governmental functions, is obviously greatest among the peoples where the conservative sentiment is weakest, and it is consequently entirely possible that a concentration of power in a single house of the legislature may be safe and even useful in one country, while justly condemned by all thinking men as likely to lead to commotions, anarchy and revolutions in another. All history teaches us that different peoples, or even the same people in different stages of advancement, are not to be governed by the like modes and forms; and while we all concede this as a general rule, we are too apt, perhaps, when we compare with our own the system which prevails in the

country from which we have mainly derived our ideas of government and law, to forget that we erected our structure on foundation ideas of democracy which never pervaded the governing classes in Great Britain, and that the aristocratic sentiment, which is there controlling, is here, in a political point of view, insignificant.

We have tried in America the system of setting bounds to the authority of government, by written constitutions which prescribe limits and furnish the means of restraint when a disposition is evinced to overstep them. It is possible that, while we have thus the letter of the law in black and white before us, we become less regardful of its spirit than we should be if its maxims were left to the watchful care and reverential guardianship of the people. It is very likely that those who frame the laws would be more careful at all times to keep within due bounds, if the responsibility of final decision upon questions regarding their own power was to rest with them rather than with some other authority. It is quite certain that enactments of doubtful constitutional validity are sometimes adopted by legislators who waive the question of doubt, when the true theory of our government requires that they should consider it carefully and conscientiously, and make their action depend upon its solution. But, on the other hand, there are advantages in our system which more than compensate for the drawbacks referred to; and the evident tendency in this country is to add to constitutional restrictions rather than to diminish their number. We discover this in the proceedings of every constitutional convention which is held; in the restraint imposed upon private and class legislation; in the increased particularity in the specification of personal rights; and in the securities devised to prevent hasty and improvident action in legislative bodies. This tendency cannot be overlooked in our consideration of the constitutional system of the American states, and, whether we regard it as wise or unwise, we have only to bow to the popular will, expressed as it is in the most solemn and authoritative manner that could possibly be devised.

It scarcely seems necessary to remark that the student of American law ought to be well grounded in English history, and to have studied the development of constitutional principles in the struggles and revolutions of the English people. It is idle to come to an examination of American constitutions without some familiarity with that from which they have sprung, and impossible to understand the full force and meaning of the maxims of personal liberty, which are so important a part of our law, without first learning how and why it was that they became incorporated in the legal system. An abstract consideration of rights may answer the purpose of the mere theorist, but it is not sufficient for the lawyer; he must deal with principles as they have found recognition in the legal system, with all the limitations which state necessity or policy may have imposed. A recent thoughtful and philosophical writer has well said that "rights are and can be real, only as they are established in the civil and political organization. They are slowly and only with toil and endeavor enacted in laws and moulded in institutions. It is only with care and steadiness and tenacity of purpose that those guaranties are forged which are the securance of freedom, and they are to be clinched and riveted to be strong for defence and against assault. The rhetoric which holds the loftier abstract conception avails nothing, until in the constructive grasp and tentative skill of those who apprehend the conditions of

positive rights, it is shaped and formed in the process of the state. The former is often the quality of some individual thinker, whose ideal is cold also in its distant elevation, and who, regarding in events only the conflict of ideas, is indifferent to the real life of men and nations; and this indifference may become, when his own ideal is unrecognized, the ground only of the scorn of an unsympathizing imagination—not the nobleness but the weakness of disdain: the latter is the work of the statesman who alone knows how patient and vigilant is the toil which is the condition of the institution of rights, and how wary and bitter is the antagonism of the forces from whose selfish grasp the ampler field of rights is wrested, and who forgets in no immediate end the long result to be attained, nor in the exultation of momentary success, or the discouragement of momentary failure, how firmly and how broadly rights, to be secure, must be enacted in the laws and moulded in the institutions of the state.”(a)

It is not our meaning that the student should read history with a view alone to the law, or that he should confine his investigations to the history of a single race: in this particular his culture cannot be too broad or too liberal; what we mean is, that to the lawyer English history possesses a value that renders its careful study quite indispensable, and that the student of law must pursue it as the beginning and foundation of his legal course if he aspires to respectable attainments. His particular and careful attention should be directed to the history of the English constitution as traced in the works of writers like Hallam and May, and from the speeches of Burke and Erskine, and other eminent statesmen of modern times, as well as from some of the leading state trials, he will derive abundant illustration of a pertinent and forcible character, that will tend to make more vivid and permanent the impression which the facts of the history leave upon the mind.(b)

From these sources he will not only derive increased love of liberty, and strengthened attachment to the institutions under which he lives, but he will be taught, also, to discern in the dry rule of law the principle which underlies and vivifies it, and he will discern how to apply correctly that principle, in new cases as they arise, by noting how it has been applied by the great minds which thus become his preceptors.

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(a) “The Nation,” by E. Mulford, p. 83. As this book has but recently appeared, attention is called to it as a work which nobly fulfills the purpose announced by the author in his preface, “to ascertain and define the being of the nation in its unity and continuity.”

(b) The leading cases on constitutional law, it would be useful to read in the same connection. Those regarded as such have been recently published, with notes, by Mr. Herbert Broom, but his work has not been republished in America. The following are the cases of most interest and importance in this country, with references to the reports or other publications where they may be found: *Sommerset’s Case*, 20 State Trials, 1, and *Lofft*, 1; the right to personal liberty; slavery the creature of positive law: *Bushnell’s Case*, 6 State Trials, 999; *Vaughan*, 135; *Freeman*, 1; 2 *Jones*, 13; jurors not to be coerced in their verdict, or called to account for it afterwards: *Darnell’s Case*, 3 State Trials, 1; illegality of arrest without cause shown; right to habeas corpus: *The Banker’s Case*, 14 State Trials, 1, and 5 Mod. 29; *Skinner* 601; 1 *Freeman*, 331; the right to private property: *Leach v. Mooney*, 19 State Trials, 1001; *Burr*. 1692; 1 W. Bla. 555; *Wilkes v. Wood*, 19 State Trials, 1153; *Entick v. Carrington*, id. 1030; 2 *Wilson*, 275; illegality of general warrants; right to protection against unreasonable searches and seizures: *Stockdale v. Hansard*, 9 Ad. and El. 1; 11 id. 253; parliamentary privilege of publication; protection of individuals against libellous aspersions in legislative documents: *Barnardiston v. Soame*, 6 State Trials, 1063; 2 Lev. 114; *Pollexf.* 470; 1 *Freeman*, 380; 3 *Keb.* 365; legislative powers and privileges. Other cases of historical value, and particularly the great cases of *Shipmoney* and of the *Seven Bishops*, are included in the collection, and all are enriched with copious notes. It may here be mentioned, also, that *Todd’s Parliamentary Government in England*—a recent work—is more full in its collection of facts than the *Constitutional History* by May; and is a convenient and useful work.

He cannot fail, also, to have it fully impressed upon his mind in the course of these investigations, that there are some bounds to the authority of government, which exist in the very nature of our organized society, and do not need to be pointed out by positive law. It is possible that he may sometimes encounter a vague impression that government may *rightfully* do whatever it has the *power* to do; and that whenever a particular department of government, or officer of any department, has not been made responsible to any other for the proper exercise of authority, the determination of such department or officer to do a particular act, must be accepted as satisfactory and conclusive evidence that the act itself is rightful and legal. Such is not the theory of the American constitutions, or of any government where rights are recognized and respected. The sovereignty with us is in the people, and they have delegated to the agencies of their creation only so much of the powers of government as they deemed safe, proper, and expedient. The power exercised must be within the grant made, and if it be not, it is usurpation, whether the means of restraint are provided or not. The people even proceed deliberately and from a conviction of the absolute necessity for such action, to impose restrictions upon their own authority; and they preclude themselves from the exercise of sovereign powers except under the conditions of caution and deliberation, which they have previously, by their written constitution, imposed. It is not, therefore, to be readily inferred that they designed any department of the government to exercise arbitrary authority. It is another common error to which our author gives no countenance, that constitutions in free states are established mainly for the purpose of giving effect to the voice of the majority, and that that voice, whenever expressed in due form, is and should be of absolute force. The student will soon perceive that this is true only in a general sense, and that in various ways the majority are curbed and controlled to restrain passion and prevent injustice. To deal arbitrarily with the rights of the minority, even though that minority be so small as to embrace a single person only, is not within the province of any free government, and the power cannot be rightfully conferred, because on no admissible theory of organized society does the sovereignty itself possess it. (c)

We must discard alike the idea of a divine origin for government, and the theoretical social compact, and acknowledge rightful authority in the physical power of the stronger to subject the weaker to his will, before we can accede to the doctrine that the greater number of votes is necessarily to hold absolute sway, or that the voice of the people is always to be accepted as the voice of Deity. Even when convened to consider what shall be the terms of their compact of government the people are not without law, and are not at liberty to regard themselves as under no restraints. The law of God precedes their action; the immutable principles of right and justice are over and about them, and cannot rightfully be ignored; the life and the liberty of the individual and the fruits of his labor are not more sacred after they have been declared by a written law to be inviolable than they were before, and the legitimate province of constitutions is to furnish them with due and ade-

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(c) "Sovereignty," says Dr. Lieber, (Civil Liberty and Self-government, c. 14) "is not absolutism." And again, he says, speaking of the despotism which is founded upon pre-existing popular absolutism: "the process [by which it is reached] is of no importance; the facts are simply these, the power thus acquired is despotic, and hostile to self-government; the power is claimed on the ground of absolute popular power; and it becomes the more uncompromising because it is claimed on the ground of popular power."—Ibid. c. 31.

quate protection instead of providing the means by which the individual may be robbed by the organized society he enters, of either or all. The eloquent denunciation by Burke of the doctrine of arbitrary power, delivered on the trial of Warren Hastings, is worthy of being repeated often, and thoughtfully dwelt upon by those who frame laws for a free people. "He have arbitrary power! My lords, the East India Company have not arbitrary power to give him; the king has no arbitrary power to give him; your lordships have not; nor the commons; nor the whole legislature. We have no arbitrary power to give, because arbitrary power is a thing which neither any man can hold nor any man can give. No man can lawfully govern himself according to his own will, much less can one person be governed by the will of another. We are all born in subjection, all born equally, high and low, governors and governed, in subjection to one great, immutable, pre-existent law, prior to all our devices, and prior to all our contrivances, paramount to all our ideas and all our sensations, antecedent to our very existence, by which we are knit and connected in the eternal frame of the universe, out of which we cannot stir. This great law does not arise from our conventions or compacts; on the contrary it gives to our conventions and compacts all the force and sanction they can have; it does not arise from our vain institutions. Every good gift is of God; and he who has given the power, and from whom alone it originates, will never suffer the exercise of it to be practiced upon any less solid foundation than the power itself. If, then, all dominion of man over man is the effect of the divine disposition, it is bound by the eternal laws of him that gave it, with which no human authority can dispense; neither he that exercises it, nor those who are subject to it; and if they were mad enough to make an express contract that should release their magistrature from his duty, and should declare their lives, liberties and properties dependent upon, not rules and laws, but his mere capricious will, that covenant would be void. The acceptor of it has not his authority increased, but he has his crime doubled." (d)

What has been said does not at all call in question the correctness of those rules which have been laid down by courts and law writers for the construction of written constitutions, and for the guidance of legislative bodies or judicial tribunals in passing upon the disputes which arise under them. What is right, what is expedient, what is proper, what constitute the inalienable rights of individuals, and what is necessary to be inserted in their constitution of government to protect them, the people who frame it must judge, and not generally he who, under it, is vested with executive or judicial functions. But in all our inquiries concerning what the law is, and how the written constitution affects the rights of individuals, we are in danger of being led to false conclusions if we do not keep in mind the primary and fundamental fact, that "written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." (e) Those instruments have

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(d) And again, he says in the same speech: "Law and arbitrary power are in eternal enmity. Name me a magistrate, and I will name *property*; name me power and I will name *protection*. It is a contradiction in terms; it is blasphemy in religion; it is wickedness in politics, to say that any man can have arbitrary power. In every patent of office the duty is included. For what else does a magistrate exist? To suppose for power is an absurdity in idea. Judges are guided and governed by the eternal laws of justice to which we are all subject." See Prior's life of Burke, ch. ix.

(e) 2 Webster's works, 392. See also, per Bates, *arguendo*, in *Hamilton v. St. Louis County Court*, 15 Mo. 13, quoted in *Coo. Const. Lim.* 36. "The principal aim of society is to protect

for one of their chief ends the protection of the rights of minorities: they seek the establishment of a government of laws which shall be restrained in its operation within the proper sphere of government, and shall protect the pre-existent rights, not take them away. (*f*)

The best aid to a proper understanding and interpretation of the law, where one's previous reading has fitted him for its consideration, is a thoughtful and patient examination of the purpose of its enactment. If one shall enter upon the study of the law under the impression that the extent of his advancement must necessarily bear some relation to the number of hours consumed in reading, and the number of pages devoured, and shall, in consequence of that mistaken impression, hurry over ground where he should proceed slowly, cautiously, and with much pains-taking, he must be brought at last face to face with the fact that he is reading to little purpose, and catching but surface views. For it is as true with the mental as it is with the physical life, that, to nourish and strengthen the powers, there must be time and opportunity for digestion; and this process demands consideration, reflection, and patient and laborious thought. "All knowledge," says Sir William Hamilton, "is only for the sake of energy;" and, again, "The paramount end of liberal study is the development of the student's mind; and knowledge is principally useful as a means of determining the faculties to that exercise through which this development is accomplished." (*g*) The study of the law must be with active mind and receptive understanding; for otherwise the student, however patient his reading, will be forced to confess in the end that, in the "nice, sharp quilllets of the law," with which his memory is burdened, he is, like Shakspeare's clown, "no wiser than a daw." That lawyer, however able, who rises in court to discuss great questions with no better or more thoughtful preparation than a great collection of precedents, from which he may read what this judge has said, or what deduction that writer has made, has generally no right to expect that he is rendering valuable assistance to the court, or that he is advancing essentially the cause of his client. Every litigated case has an aspect of its own, and is supposed to present some new combination which renders it doubtful what principle should be applied, or what circumstance should be controlling; and what the court needs is, to have the principle pointed out, and the why and the how of its applicability explained. Judges may read books and hunt up precedents for themselves; but they have not always the leisure to

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individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals." Post, book 1, p. 124.

(*f*) "All endeavors to throw more and more unarticulated power into the hands of the primary masses, to deprive a country more and more of a gradually evolving character; in one word, to introduce an ever-increasing, direct, unmodified popular power, amount to an abandonment of self-government, and an approach to imperial sovereignty, whether there be actually a Cæsar or not—to popular absolutism, whether the absolutism remain for any length of time in the hands of a sweeping majority, subject of course to a skillful leader, as in Athens after the Peloponnesian war, or whether it rapidly pass over into the hands of a broadly named Cæsar. Imperial sovereignty may be at a certain period more plausible than the sovereignty founded upon divine right, but they are both equally hostile to self-government, and the only means to resist the inroads of power is, under the guidance of Providence and a liberty-wedded people, the same means which in so many cases have withstood the inroads of the barbarians, namely, the institution, the self-sustaining and organic system of laws." Lieber, *Civ. Lib. and Self Gov.* ch. 33.

(*g*) *Metaphysics*, §§ 1 2.



devote to each case that thought and reflection which the counsel is employed to give, and which may be essential to insure its being grounded on the proper basis. This is the duty of the counsel; and when he has read what he supposes to bear upon the case, and has carefully arranged and digested his learning, he has a right to feel confident in his preparation, and in his ability to present a more forcible and convincing argument to the court—applying it, as he will, to the precise facts of the controversy—than any he can read from the authorities. Indeed, much reading of undigested cases, or even text-books, at the bar, is usually a waste of time, or at best only answers the purpose of directing the attention of the court to a great number of decisions which might, with equal profit, be specified in a written list to be handed up to the judges for their subsequent investigation. For such reading will often leave only a vague and imperfect idea that the authorities read from have some sort of bearing upon the question under consideration, but precisely what, the judge must satisfy himself afterward by making that study of them which the counsel has failed to make.

The caution regarding thorough preparation for practice is more needful in cases regarding fundamental rights, than in any others. The temptation is too great in America for practitioners to open offices and tender their assistance in legal causes without any such examination of the institutions under which they live as will entitle them to be heard on questions of constitutional authority. It is too often—indeed, it is usually—the case, that law reading is directed mainly to preparation for an early entry into practice, in simple cases and in the lower courts, and that works on contracts and on torts are allowed to occupy the attention to the exclusion of the works on government. Something of politics the student will be inclined to learn; and it will not be surprising if the temptations of political life shall beset him early, and lead him away into excitements that are fatal to regular and dispassionate investigations; for, in politics, one reads not so much to form judgments as to gather arguments in support of pre-existing notions; and notoriety in that field is quite consistent with great ignorance on constitutional subjects. The leaders of the political party will be read; while the jurists, whose business it has been to treat constitutional subjects from a judicial stand-point, are overlooked; and the training which one obtains in that way, while it may fit him for making an effective stump speech, goes but a little way in the preparation for undertaking such great questions of government as the lawyer of reputed ability is liable at any time to be called upon to grapple with.

What sort of an argument, for instance, would have been made by Mr. Hargrave in the great case of *Sommersett*, had his reading and reflection been confined within the narrow bounds which many law students of the present day seem willing to accept as furnishing sufficient scope for their powers? Would that eminent judge, who is admitted to have made, with reluctance, a decision, which, in the law of personal liberty, will be a landmark for all time, have been brought to the point of conviction which would insure its being made at all? Nor are we to suppose that all the great questions regarding individual liberty have been disposed of by the decisions of Lord Mansfield and Lord Camden; or, to pass to questions peculiar to our own country, that all doubts concerning the proper limits

of federal authority were settled by the decisions of Chief Justice Marshall, so that nothing is left to the lawyer of to-day but to apply the principles that he laid down to the new cases which from time to time arise. Cases have arisen in our own time quite as important as *McCulloch v. Maryland*, or any of the other great controversies to which Judge Marshall brought his matchless logic and pre-eminent wisdom. The question of the proper bounds of martial law ;(*h*) of the right of the federal government to make any thing but gold and silver coin a legal tender in the payment of debts ;(*i*) of the meaning of the term "bills of attainder," and the power of the states to impose test-oaths in order to exclude from office or professional employment those who may have taken part against the government ;(*j*) have recently demanded authoritative decision, and have moved the nation as profoundly as did any of the earlier cases. But there are many questions lying along the border line between federal and state authority which still remain to be discussed and settled. Whether, for instance, the government of the nation may rightfully impose stamp duties upon contracts permitted by the states, and declare the contracts invalid as a penalty for neglect to affix the stamp ;(*k*) whether it has constitutional authority to tax the salary or other compensation which a state officer receives from the state for his official services ;(*l*) whether the states may constitutionally bargain away the power of taxation in any given case, and whether, if they do, the federal courts are to enforce the bargain under that clause of the constitution of the United States which forbids the states passing any law impairing the obligation of contracts ;(*m*) how far the grant of exclusive privileges is enforceable against a state ; and many others of the like importance, are not yet transferred beyond the region of controversy, and are to be pondered, perhaps discussed and settled, by the young men who shall hereafter come upon the stage.

And passing beyond the province of the federal power, we do not find that all is plain in the constitutional law of the individual states, and that the functions of government are clearly defined, and its limits definitely marked out. The great question of the right of the state to teach religion in its schools, or of its duty to abstain from such teaching, and what precisely is meant by the doctrine of religious liberty and equality as we have engrafted it in our constitution, are still, it appears, open questions, and threaten violent and angry controversy. (*n*)

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(*h*) *Ex parte Mulligan*, 4 Wal. 2.

(*i*) *Hepburn v. Griswold*, 8 Wall. 603.

(*j*) *Cummings v. Missouri*, 4 Wal. 277 ; *Ex parte Garland*, id. 333.

(*k*) The right has been questioned. See *Craig v. Dimock*, 47 Ill. 300 ; *Sammons v. Hollo-way*, 20 Mich. ; *Carpenter v. Snelling*, 97 Mass. 452.

(*l*) This also is disputed, and Mr. Justice Clifford is understood to have denied the power.

(*m*) On this subject see the cases collected in *Cooley's Constitutional Limitations*, p. 280, note. See also the dissenting opinion of Mr. Justice Miller, concurred in by the chief justice and Mr. Justice Field, in *Washington University v. Rouse*, 8 Wall. 441. One must be convinced, on reading this case, that the law upon the subject must still receive further examination in the tribunal of last resort, and that the doctrine of previous decisions is not entirely satisfactory.

In illustration of another question lying along the border line between federal and state authority, and threatening to breed difficulty and danger, the reader is referred to the case of *Fenton v. Farley*, 9 Am. Law Reg. N. S. 401, and the forcible note of Judge Redfield appended thereto.

(*n*) Attention is directed to the thorough examination which this general subject underwent in the case of *Minor v. The Board of Education*, in the superior court of Cincinnati (pub-

The limits of local self-government—what it properly embraces, in what directions and how far it may be extended, and in what degree the state may limit and control it—are still demanding the attention of both the lawyer and the legislator, and questions concerning them become at times of universal importance. (o)

Not less difficult and important are the questions regarding the proper division of governmental powers between the three departments created for their exercise. We have endeavored so to frame our constitutions that “the legislative department shall never exercise the executive or judicial powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the legislative or executive powers, or either of them; *to the end that it may be a government of laws, and not of men.*” (p) But what is legislative and what is executive, and what is judicial power, and who shall say when either is seized into usurping hands?

The attention of the student is called to a few of these questions for the purpose of indicating the broad fields which still await the laborer who shall fit himself to enter them. The foundation for due preparation must be laid in student life if ever, and he who lays it broad and deep may find himself called upon to take part in the struggles of the giants which some day will be had over these questions. No small share of this preparation will be made when the author before us is carefully read and understood, but the standard American writers on government ought also to be familiar, and what is peculiar in our system should be made the subject of special study and examination. In this field of his inquiries the student will meet with much that is crude, and with many decisions made under circumstances precluding due deliberation, and perhaps presenting to the mind only vague and indefinite notions of constitutional right; but it is not essential that he should follow blindly the leading of any man or any court; the light is always attainable if he will but strive for it, and the greater the confusion of authority, the greater is his credit if he can succeed in pointing out clearly the principle that should govern. (q)

lished by R. Clarke & Co., Cincinnati), and to the masterly arguments made at the bar. The case shows how important it is that the investigations of a lawyer, especially on constitutional questions, should take a wide and liberal range, and that he should make himself thoroughly familiar with the fundamental principles of the government under which he lives. The arguments of counsel are deserving, for their ability and research, as well as for the importance of the subject discussed, of the most careful and thoughtful examination. It is well with any lawyer when he is so full of his subject that he can truthfully say, as was said by the honorable Stanley Mathews, at the close of a long and masterly argument, replete with learning, and glowing with apt illustration: “There is a *world of things crowding upon me to-day*; but I must forbear.”

(o) The question of the right of a state to require or empower its municipalities to aid, by loans or donations, the private corporations who are engaged in constructing works of internal improvement, is certainly one of the most important now before the American people. There are many who question the right, on the same ground, substantially, on which patents of monopoly were declared unlawful in the time of Queen Elizabeth. “*For the end of all these monopolies is for the private gain of the patentees.*” not for the benefit of the public. *Darcy v. Allain*, 11 Rep. 84.

(p) This is an extract from the constitution of Massachusetts.

(q) Upon the subject of the federal constitution, no work as yet supersedes the elaborate treatise of Mr. Justice Story; though if it were re-written in view of recent events and authorities, it might be made much more valuable, and be largely increased in interest to those who shall hereafter read it. Some very convenient little hand-books, presenting analyses of the constitution, and some of them giving the decisions of the courts under its several clauses, are

The admirable lectures of Chancellor Kent every student is expected to master after he has made himself familiar with the Commentaries of Mr. Justice Blackstone. Those lectures give us a pleasant, though very much condensed, view of the general principles of the law of nations; of American constitutional law, of the sources of the municipal law of the several states, and of the absolute and relative rights of individuals. The law of corporations next engages attention. Students who read by themselves usually complete the reading of this work before passing to any other, but if, instead of so doing, they should adopt the course, after mastering the lecture upon a particular subject—as for instance the subject of corporations—of taking up one or more of the leading treatises upon the same subject, they would make more sure of their ground as they progressed, and be likely to acquire a knowledge more precise and accurate. The clear and lucid presentations of the leading principles of all these subjects made by Kent will prepare one to master the details of the more extended work. (r) Passing then to the law of personal property and of contracts in Kent the student will find it useful in like manner to follow with the works of text writers devoted to these branches of the law. (s) Works upon particular divisions of the law of contracts, such as bailments, agency, partnership, and mercantile law generally may usefully be read in immediate sequence. Upon all these extended and exhaustive treatises will be met with, and as the subjects are of every-day importance in the lawyer's practice, it is likely that these treatises, or others of equal value, will be presented in new editions from time to time as accumulating decisions or new circumstances shall render important, so that the student may at any time have in some one or more of them a satisfactory and reliable view of the existing law. (t)

When the student, in pursuing this course, shall reach the law of real estate, it would be well for him to pause for a moment, to consider some of the circumstances which are apt to render its study superficial. There is no lack here of abundant and safe guides, for the works upon real estate law are numerous, profound and exhaustive; but that they do not prove attractive must be confessed, and that they fail to receive that attention which the importance of the subject demands is evident. The student who has studied the law of contracts faithfully and with interest will not unfrequently suppose he may safely slight the law of real estate, and, after acquainting himself with the ordinary forms of conveyancing, and a few of its familiar

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readily attainable. The foundations of federal constitutional law may be traced very satisfactorily in the pages of the Federalist, and Elliot's Debates will be useful for reference. Upon International law Mr. Wheaton's treatise still retains the first rank.

(r) Upon corporations, the best now in use is the treatise by Angell & Ames. It seems, however, to prove repulsive to students, though almost indispensable to the practicing lawyer. Grant on Corporations is also a good work, and the law on the same subject is also set forth very fully and clearly by Mr. Redfield in his work on railways.

(s) Williams on Personal Property is an excellent work. Metcalf's Principles of the Law of Contracts is a good introduction to this subject, but the student must not content himself with that. There are several elaborate treatises on contracts now in use; that by Mr. Parsons being the general favorite. Browne on the Statute of Frauds is valuable in the same connection.

(t) Edwards on Bailments, and the work by the same author on Bills and Notes are careful and judicious treatises, and are always read with satisfaction. The works by Mr. Parsons on Notes and Bills, and on Partnership are also valuable. Collyer on Partnership is preferable to Story. Mr. Smith's treatise on Mercantile Law is an excellent one, and Mr. Parsons has written acceptably on the same subject.

rules, will pass on to other subjects in which his interest is more readily engaged.

Upon no other branch of the law has so much patient thought and so much profound learning been expended as upon the law of real estate. Some of the treatises in this department have been the admiration and delight of the ablest cotemporary lawyers, and are never read without leaving profoundly impressed upon the mind their wonderful erudition and thoroughness. For this very reason, and because their proper study tasks the mind so severely, they have been shunned by the student. Works like Littleton's *Tenures*, *Fearne on Contingent Remainders*, *Saunders on Uses and Trusts*, and *Sugden on Powers*, will not willingly be selected by the beginner as his text-books, if he can make himself believe that, after reading *Blackstone* and *Kent*, he will attain the same practical end by familiarizing himself with the common forms of conveyancing, and with the questions which most often arise between vendor and purchaser. And the whole tendency of modern legislation concerning real estate has been to lull the student into a false security, and to incline him more and more to rely upon such superficial knowledge as might answer the purpose of the conveyancer, but which fails to embrace the questions of nicety and difficulty. In both England and America the attention of some of the ablest minds has been directed to a reform in the law of real estate, with a view to relieving it of unnecessary and cumbrous forms, useless technicalities, and fictions which answer no useful purpose. The changes they have introduced have been great; in some respects very radical: and their influence has been to impress us with the belief that the ancient learning in real estate law has become obsolete and useless, and that time can be more profitably spent in acquiring a practical knowledge of the manner in which business is now done, than in poring over the musty books which were the vade mecums of a past age, but which have now become mainly matters of antiquarian interest. Other important circumstances, which have operated mainly in the newer states, have had a tendency in the same direction. Real estate has been cheap; we have been near the source of title; conveyances of any particular parcel have not generally been numerous, nor the title complicated; the modes of transfer have been tolerably uniform and well understood; we have a general system of registry designed to give purchasers information concerning the conveyances which have been made; and, as every man of plain common sense is able to understand all these, one naturally comes to think that the nearest justice of the peace is competent to transact the business connected with his purchases and sales, and that his own good sense is sufficient to protect him against flaws in titles, or against being entrapped through the means of inadequate conveyances of the land he buys. Unfortunately he sometimes discovers, when too late, that unaided good sense is not always an infallible guide in matters of law, and that one who relies upon it implicitly is in the proper condition of mind to be made the victim of misplaced confidence. Many a man has lost his all by assuming the sufficiency of his own knowledge and judgment in real estate matters, and by resting satisfied with his own examination, or that of his county register of deeds, where he ought to have called in the best legal advice that was attainable. Sharp schemers do not overlook this fact, and many of them thrive by it; but we should be obliged to confess, if interrogated on that point, that many legal practitioners also do not properly appreciate the nature

of their task when called upon to advise regarding titles, and that the assistance they assume to render is admirably calculated to lead astray. (*u*)

There are not many things in the old law of real estate which the lawyer will find it without importance to know, and his knowledge will

(*u*) Of this there could not possibly be a better illustration than the implicit reliance which is apt to be placed upon the county records of deeds as a means of ascertaining precisely the situation of the title to a particular parcel of land. A little reflection will convince us that these records cannot give all the information requisite: that it is entirely possible for perfect titles not to appear upon them at all, and that often they will indicate an indefeasible right in one who, in fact, has no title whatever. Indeed, in many cases, the nature of perfect titles is such that they cannot be spread upon the records, and in all cases there are important facts concerning which the record is silent, and which must necessarily be determined by extrinsic inquiries.

To illustrate this, let us suppose that a lawyer's client brings him an abstract from the county recorder's office, and requests his opinion as to the title which it describes. Let this abstract be in the following form:

"Southwest quarter of section 12, town 9 south, range 2 east, Ohio.

1. Entered by John Hemingway and patented by U. S. to him August 1, 1836.

2. John Hemingway to William Jackson, warranty deed; dated September 10, 1836; recorded March 18, 1838, in liber B of deeds, page 80. Duly witnessed and acknowledged.

3. William Jackson to Richard Benson, warranty deed; dated March 18, 1838; recorded same day in liber B of deeds, page 81. Duly witnessed and acknowledged.

4. Richard Benson and Harriet, his wife, to James Byles; quit-claim deed; dated October 1, 1862; recorded same day in liber Y of deeds, page 292. Executed in the state of New York and properly certified.

5. James Byles, by William Smith, his attorney in fact, to Edgar Bennett; warranty deed; dated July 15, 1868; recorded October 12, 1868. In due form of law.

The records of this office show no mortgages or other liens upon the land, and the title appears to be perfect in Edgar Bennett. John Doe, register of deeds."

Nothing apparently could be more straightforward and business-like than this document, and one is probably safe in saying that the majority of purchasers would rely upon it implicitly, and would receive and pay for Mr. Bennett's conveyance without suspicion that it could possibly prove defective. But a prudent conveyancer would feel no such reliance, but would treat this document as an assistance merely in the necessary investigations; as a guide in his inquiries, and not as in and of itself presenting the needed information. He would, therefore, inform his client that further investigation would be necessary; that a register of deeds could not make a title good by certifying to its correctness, and, indeed, could not properly give such a certificate at all, and that all the facts which are stated in this abstract are not inconsistent with a worthless claim in the party here stated to have a perfect title. And he would thereupon proceed to obtain from other sources the information which the record could not give.

1. By inquiries of his client, of the present claimant, and of other sources, he would endeavor to ascertain as much as possible concerning the several grantors mentioned in the abstract of title, where they lived, and what was their connection with the possession of the land, and their identity with the grantees of the same name. Also, whether other parties have at any time been in possession of the land, and if so, for how long and under what claim of right. All these inquiries may be of the utmost importance, as we shall soon perceive, and aided by them he will proceed to consider the successive steps in the chain of conveyances.

2. The patent by the United States to any one may generally be assumed to convey the title, the United States having been the original owner of all the region in which this land is situated. Still, it is possible for such a patent to be void. The government may, previously, have patented the same lands, and the second patent may have issued through mistake, in which case it would of course be void. Or the government after having once parted with its title may have acquired some right again — as sometimes happens in enforcing its demands against public debtors — and, in this case, its subsequent conveyance could give no better title than the government had acquired by its purchase. It would be necessary, therefore, in such a case to scrutinize the title of the government with the same care that would be requisite in the case of any other proprietor.

3. Coming to the conveyance by Hemingway, the first inquiry which suggests itself is, whether he be the same person to whom the government conveyed? Identity of name is no more than *prima facie* evidence of this fact, and may not be even so much, if his residence, as given in his conveyance, appears to be different. Let us say here, once for all, that *a record can never identify parties*: outside inquiries are absolutely essential for this purpose, and when it is so easy for one man to personate another, and when besides there are often many persons of the same name, these inquiries cannot be too particular. A conveyance by any other John Hemingway than the one to whom the government conveyed, or by any person

sometimes be called into requisition under circumstances which preclude a resort to the books for careful investigation. The man who *in extremis* sends for his legal adviser to draft a complicated will may be blamable for delaying so important a business until the immediate urgency is so great, but in this regard he is only equally negligent with

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falsely assuming his name, would of course be void; and no title apparently good of record could protect a purchaser against the claim of the real patentee.

4. Suppose the inquirer to have satisfied himself of the identity of the patentee with the grantor of Jackson, a further question is, whether he had made any other conveyance, or any mortgage of the lands previous to the recording of the deed to Jackson. And this brings us to notice the principal object of the registry laws, which is, to *give notice to purchasers of any previous conveyances or liens by the person of whom they buy*. A purchaser who examines the records and finds no conveyance by his vendor has a right to assume that none exists; and if he then receives a conveyance in good faith and for value paid, and places it upon record at once, he is protected by it, even though there be a prior conveyance also obtained for value. As between two *bona fide* purchasers, the registry law gives protection to him who was sufficiently diligent and prudent to have his deed immediately recorded, and the deed of the other, even though prior in point of time, is void as to him, provided he had no notice of it when he bought, received the conveyance and paid the consideration.

5. As no wife appears to have joined in Hemingway's deed, it will be necessary to inquire whether he was at the time a married man, and if so, whether his wife is still living. If she is, she has or may have a right of dower, and the facts regarding this will need investigation.

6. In the case of this and also every subsequent deed, it is important not to be satisfied with the simple statement that it is a "warranty deed," but to examine its terms and see what the covenants are, and also whether it gives any intimation of any fact which qualifies in any way the title of the grantor to the possible prejudice of a purchaser. Although there are no mortgages of record, there may be some in existence, and the deeds may give information concerning them. Such information the purchaser is bound by, for it is a general rule that *a man is regarded as notified of whatever appears in the instruments which constitute his chain of title*; and whether he actually reads them or not he is equally chargeable with knowledge of their contents. *Jackson v. Neely*, 10 Johns. 374; *Brush v. Ware*, 15 Pet. 93. *Daughaday v. Paine*, 6 Minn. 452; *Reeder v. Barr*, 4 Ohio, 446. If therefore a deed refers to an unrecorded mortgage, or to any other outstanding claim, it becomes necessary to ascertain its present condition and validity; for a purchaser will take subject to the rights under it of which he is constructively notified. It is important also to see that the deeds contain the proper words of inheritance. See *post*, book 2, page 107, and notes.

7. The attestation and acknowledgment of the deed are to be compared with the statute in force at the date of execution, to see if they constitute a compliance. And it is always to be borne in mind that the record of a deed not executed as required by the recording laws is a mere nullity, and cannot be used as an instrument of evidence. *Clark v. Graham*, 6 Wheat. 577; *Choteau v. Jones*, 11 Ill. 300; *Pope v. Henry*, 24 Vt. 560; *Galpin v. Abbott*, 6 Mich. 17; *Work v. Harper*, 24 Miss. 517; *Patterson v. Pease*, 5 Ohio, 190. If there is any defect in this particular, the original deed should be obtained for the purposes of having the proper correction and a new record made.

8. Coming to the deed from Jackson to Benson, the same questions regarding identity are to be asked, and the same precautions observed in other respects which have already been pointed out.

9. The deed from Benson to Byles is by quitclaim. A deed without covenants is as effectual to convey the vendor's title as any other, but the fact that the vendor declines to insert covenants in his deed when his title is apparently perfect, is a circumstance which always suggests doubt in respect to the title, and renders additional caution important. Generally the vendor who has no doubt regarding his title will not hesitate to give the ordinary deed of warranty, and the purchaser, if he is buying for full value, will insist upon having it. It is a reasonable inference when a mere quitclaim is given, that both parties supposed the title might prove defective, and that the purchaser has bought at a discount in consideration of the risk he assumed. And it may prove, on inquiry in this case, that the William Jackson who conveys was not the purchaser from Hemingway, but only one of several heirs at law who had sold and quitclaimed his undivided interest. In such case the interest of the other heirs would not be affected by his conveyance, and the right which could be claimed by his grantee, though apparently good to the whole land, would in reality be valid for his undivided interest only.

10. And this leads us to remark, that the title derived by descent or devise from a deceased person does not usually appear on the records of the office of the recorder of deeds, and in some states there is no provision of law by which it can be made to appear. When a person dies leaving no will, the title to his real property vests at once in his heirs at law, subject to be divested in case it should become necessary, in the course of administration, to resort to it as assets for the payment of debts. The heirs may sell their right, and no other steps are essential for the

a great many of his fellows, and the lawyer must be prepared for calls of this character, and ready to respond to them. The most difficult and intricate questions he is ever compelled to grapple with will sometimes present themselves when the proposed testator states his wishes regarding the settlement of his property, and in many cases they must

purpose than would be required if their title had come by purchase. One who should buy of them must take subject to the following contingencies:

A will of the ancestor may be discovered and probated, which shall devise the estate to other parties.

Administration may be taken on the estate, and debts proved to an amount exceeding the personal assets, and then it may be necessary to sell the real estate in order to pay them.

Each heir can convey his undivided interest only, and the purchaser at his peril must ascertain the number and identity of the heirs, and the extent of their respective interests. Even where an estate is being duly settled under the statute, the probate records are not conclusive upon these subjects, at least before the final decree of distribution. The purchaser must also, at his peril, ascertain that the heirs from whom he buys are of the proper age to make conveyances.

11. As the Benson deed appears to have been executed in the state of New York, it is important to ascertain what provision was made by the law of Ohio for the record of such deeds. The law of the jurisdiction where the land is—the *lex rei sitæ*—is the law which must govern such conveyances; and a deed, perfectly good in New York, where it is executed, may prove insufficient, under the law of Ohio, where the land lies. The statutes of the several states will be found to provide in what manner deeds of lands therein, when made abroad, shall be executed; and the deed must, therefore, be compared with the statute, to see if there has been a compliance. And, as there is no common law on this subject to help out a defective conveyance, nothing short of a substantial compliance with the statute will avail. A defective deed may amount to a valid *contract of sale*, the specific performance of which may be enforced; but a purchaser wants the *title*, and not a lawsuit.

12. Benson's deed to Byles appears to have been executed more than twenty years after he obtained his title. It is possible that in this interval his right may have been extinguished by an adverse possession. This consideration is, of itself, sufficient to demonstrate the importance of making inquiries regarding the occupation of the land; but they would also be important, though in a less degree, where sufficient time had not elapsed for the statute of limitation to attach. It is a rule, generally, though not universally, recognized, that, *where one buys land in the possession of another, he takes it subject to the rights of the possessor, whatever they may be*. *Lea v. Polk Copper Co.*, 21 How. 493; *Hughes v. United States*, 4 Wal. 232; *Morrison v. Kelly*, 22 Ill. 610; *Coleman v. Barklew*, 3 Dutch. 357; *Helms v. May*, 29 Geo. 121; *McKee v. Wilcox*, 11 Mich. 358. The exception to this principle is where the possessor sets up a claim in opposition to his own conveyance. *Scott v. Gallagher*, 14 S. and R. 333; *Newhall v. Pierce*, 5 Pick. 450; *Bloomer v. Henderson*, 8 Mich. 395. Or where possession by him is consistent with the title appearing of record: *Patten v. Moore*, 32 N. H. 384; *Truesdale v. Ford*, 37 Ill. 210; *Elly v. Wilcox*, 24 Wis. 531. See further, *McKinzie v. Perrill*, 15 Ohio St. 168; *Crassen v. Swoveland*, 22 Ind. 434. A man, therefore, who is in possession under a lease or an unrecorded deed is protected by his possession, and other persons cannot acquire equities as against him, where they buy without taking the trouble to inquire into the nature of his claims.

13. Benson's wife appears to have united in his deed, for the purpose of releasing her right of dower. As to this, it is important to know:

Whether the execution and acknowledgment of the deed by her were in due form, as required by the statute; for, if not, they are void. A married woman has no general power to release her contingent right of dower during coverture; and can only do so in the manner the statute has prescribed. The strictness with which statutory forms are required to be observed may be seen in some of the cases which Mr. Washburne has collected. 1 Washb. Real Prop. 200, et seq.

Also, whether the wife was of lawful age at the time of executing the release. The statute which authorizes the wife to release her contingent right of dower does not relieve her of any other disability which she may be under, besides coverture; and, therefore, if she be, in law, an infant, her deed is void. *Hughes v. Watson*, 10 Ohio, 127; *Priest v. Cummings*, 16 Wend. 617, and 20 id. 338; *Jones v. Todd*, 2 J. J. Marsh. 359. Some of the states, however, it is believed, have changed this rule.

14. The deed from Byles to Bennett appears to have been executed by attorney. Was this attorney duly authorized? To answer this question intelligently, we must have the power of attorney before us. It must be under seal, and its terms must be such as to empower this particular deed to be executed. If the examination is satisfactory on this point, the purchaser would need to go still farther, and ascertain whether or not it remained unrevoked when the deed was made. Byles, in the mean time, may have died or gone into bankruptcy, or he may have expressly revoked his letter of attorney by an instrument for the purpose, duly executed



be met promptly and settled without delay. To enable a lawyer to enter upon such a task without misgivings, he must have fitted himself by a thorough study of the elementary rules as presented and discussed in the leading treatises; and if he has contented himself with a smattering of real estate law—such as may enable him to buy and sell real estate and draft common conveyances, he has no right to jeopard the interests of those he assumes to aid, by drafting an instrument, the legal effect of which he can only guess at. A layman would be even less likely to mislead, for he would generally abstain from the use of technical language, which, in the hands of persons who are employing it without sufficient knowledge, is always liable to express a meaning which is not in the mind of him who uses it. It is impossible to urge too strongly upon the young men who are hereafter to come to the bar, the importance of thorough preparation in the law of real

and recorded. If satisfied that the power remained in force, the next question is, whether it has been duly executed. The deed made under it should be executed and acknowledged in the name and as the deed of the principal by William Smith, his attorney, and not in the name and as the deed of the attorney himself. *Elwell v. Shaw*, 16 Mass. 42; *Barger v. Miller*, 4 Wash. C. C. 280; *Thurman v. Cameron*, 24 Wend. 90; *Harper v. Hampton*, 1 Harr. and J. 709. If defective in this particular, extrinsic evidence cannot be resorted to for the purpose of showing that the attorney designed to make the proper conveyance which he had failed to execute. *Wilkinson v. Getty*, 13 Iowa, 157.

15. As James Byles executes the deed alone, inquiry must be made whether at the time he was a married man, and if so, whether his wife is still living. And this may be important for a further purpose than to ascertain whether a dower right exists. The land may have been the *homestead* of Byles; and if occupied as such, it may be found that, at the date of this deed, the statute of the state forbade its alienation except by a deed in which the wife joined.

16. When satisfied upon all these points there are still others which present themselves for investigation. There may be tax titles upon the land; it may have been sold in judicial proceedings against any of the several owners; any of them may have gone into bankruptcy and lost his title thereby; any of the deeds in the chain of title may be forged, and therefore void; any one of the grantors may have been an infant, insane or idiotic; there may be suits pending in chancery which affect the land; and the prudent lawyer who is employed to investigate the title will never rest satisfied until he has made his inquiries cover all these points.

The title here supposed is one of the most simple character, and presents none of the abstruse or difficult questions which are constantly arising in real estate transactions. If one link in the chain of title happens to be a will, new and more difficult questions will arise. It may then become important to know whether the rule in *Shelley's case* is in force in the state or not; for the nature of a devisee's estate, whether a fee or not, may depend upon it. And in any case of a devise it will be important to ascertain whether the will has been duly probated and the estate duly settled; for until then, the title of the devisee is subject to contingencies. If one link is a judicial sale, or a sale by executor, administrator or guardian, or a tax title, the lawyer ought to examine every step in the proceedings carefully; to take nothing for granted, but satisfy himself from his own inspection that every thing is substantially correct and regular.

If an examination is being made for the purposes of a suit, it ought to be equally particular and careful, and the lawyer ought to see not only that the title is good, but that it is capable of being proved. Sometimes he may be convinced by his inquiries, and yet not supplied with the means of proof. He should remember that it is one thing to satisfy himself, and another to supply legal evidence which can be laid before a jury. The memorandum of his investigations which he makes, as they progress, ought to give full information, not only for his own present use, but for the purposes of a trial if any should be had, or for the information of any subsequent purchaser from his client who may have occasion to go over the same ground. A lawyer is inexcusable who trusts the results of such investigations to memory alone.

These few hints will suffice to show how utterly insufficient and misleading are the ordinary abstracts of title upon which so many purchasers rely; how impossible it is that the records should give completely the information regarding the true state of titles, and how important that one who would examine titles should not only have some knowledge of law, but should make his investigations with his mind awake to all the numerous and diversified circumstances which may affect the title, even in the cases which upon the surface appear the simplest. And this note is inserted, not as indicating all the points to be borne in mind in these cases, but as illustrating the necessity of caution and thoughtful vigilance.

estate ; and it may tend to their encouragement in so doing to add, that as lands become more valuable and wealth increases, in no other branch of the law is real preparation and genuine attainment likely to be better appreciated or better rewarded. (v)

There is a class of real estate questions which is peculiar to this country, and in handling which the student will not be greatly aided by the old text-books or old decisions. They are, nevertheless, questions which arise often, and which, hereafter, there will from year to year be still more frequent occasion to deal with. We refer to those which relate to the validity of sales of lands for the non-payment of the taxes assessed upon them. We do not know how the lawyer, who is disposed both to labor and to think, could well be called into a more tempting field than the examination of these questions. Large as has been the number of decisions regarding these sales, and varied as have been the questions passed upon, almost every new case that now arises presents some unusual combination of facts and circumstances which enables some new and perhaps difficult question to be raised. The difficulties are enhanced by the different views which different classes of minds are disposed to take of this species of title, and of the maxims of law by which they should be governed. If we look only to the interest of the state, and regard the collection of the tax at all hazards as the prime object to be attained, we may be disposed to press governmental power to an extreme which would deprive the individual of the benefit of those principles which have been shields for the protection of private property from before the time of Magna Carta. If, on the other hand, we look mainly to the interest of the individual, bearing in mind the great variety of causes which prevent the prompt payment of taxes — causes most often operating in the cases of minors and other persons incapable or unaccustomed to business, and remembering also the merely nominal price usually paid for lands at tax sales, we may be disposed to look upon these sales as a species of state robbery, to disappoint and defeat which, the courts should be vigilant to seize upon every reasonable pretext. These diverse views find able representatives in the legal profession, who press them upon all occasions ; but the lawyer who is ready to accept them as extreme views, and to examine tax titles with the same unbiased mind which he would bring to the consideration of a mortgage or of a conveyance by bargain and sale, will not fail to find that there is ample opportunity for the display of legal ingenuity and acumen, and for the satisfactory application of fundamental legal maxims as the new and peculiar circumstances, which these cases so often exhibit, present themselves. The thoughtful lawyer cannot doubt that the old and well-settled principles of law are to be applied in these as in all other cases, nor that they are sufficient, if rightly applied, for the protection alike of the interest of the state and of the individual rights of the citizen ; and if he enters upon his investigations with these points conceded in his own mind, much of the difficulty supposed to be inseparable from this species of conveyance will disappear, as he comes fully prepared to encounter it. The maxims

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(v) Mr. Williams's little work on Real Property is an admirable assistant to the student, and an agreeable introduction to the Digest of Cruise. Our appreciation of Mr. Washburn's Treatise is shown by the frequent references to it in the following work. No book is more reliable ; and the same may be said of the treatise by the same author on Easements. Jarman on Wills is the best English work on that subject at the present time, but is nearly superseded in this country by the treatise of Judge Redfield.

of individual right are all limited, restrained and qualified by others which regard public duty and state necessity; each and all, when properly understood, supply light for the guidance of the lawyer in his examination of the numerous and often informal and imperfect records which constitute the evidences of title in these cases, and if he possesses the necessary industry and perseverance to make a complete and careful examination of each case in which his services may be required, the questions of law involved will not often fail of a satisfactory solution under his intelligent and persevering attempts to master them. (*w*)

If the law of real estate proves generally unattractive, criminal law, on the other hand, is likely to excite the imagination and enlist the interest of the student, who will look forward to its practice as the field of his most striking and inspiring triumphs. Yet as these triumphs are popularly supposed to be achieved mainly by the power of eloquence, and by appeals to the sympathies and the passions of men rather than by the force of dry legal logic, or the careful mastery of the rules of law, the embryo advocate needs to guard his inclinations carefully, lest he may find himself in his preparation relying too exclusively upon showy attainments, and neglecting that solid foundation in the law without which the most shining natural abilities, and the most careful and elaborate training in elocution, will at times prove of no avail.

If the leading principles of criminal law are plain and easily mastered, if the pleadings are simple and the practice without complication, there is nevertheless a continual possibility that some unexpected and difficult question may arise for which the works on criminal law state no precedent and furnish no solution. What criminal lawyer in large practice can tell whether the fate of his client in the next case in which his services may be demanded is to turn upon mere questions of fact, or on the other hand to depend upon some important principle of consti-

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(*w*) To illustrate the manner in which the principles of law which are applicable to these cases affect and qualify each other, the following may be mentioned:

That the state has an undoubted right to compel every species of property within its limits to sustain its proper proportion of the burden of supporting the government, and to that end, if necessary, to divest the owner's title by a public sale.

That the owner has an equal right to have the proceedings for levying a tax upon his property prescribed in advance by law, so that he may understand what is his duty regarding its payment, and how he may comply with that duty: and he is not to be dispossessed of his property until he is in default for failure to perform his obligations to the state.

That statutes for the assessment and collection of taxes are to be construed like other statutes; not with a strictness that shall defeat their purpose, nor with a liberality that shall enlarge their terms; the object to be attained being to ascertain the meaning of the legislature in their several provisions, and then to give them effect.

That whatever securities the legislature has provided for the protection of the interest of the taxpayer, are to be understood as thrown around his property to prevent its being appropriated improperly, and they therefore constitute walls of protection which the other departments of the government cannot throw down or leap over.

That the letter of the law is not to be regarded rather than its spirit: and as a strict and literal compliance with provisions which are unimportant to the individual assessed is extremely improbable in proceedings of this description, where the steps to be taken are numerous and the persons who are to take them generally unlearned in the law, the legislature, it is to be assumed, did not intend to make such literal compliance a condition precedent to the collection of the public revenue, and the immaterial variations may be disregarded or cured retrospectively.

Other rules might be specified, but it is not important to our present purpose; the chief difficulty in these cases being after all in the proper application of these, and in determining what regulations of statute are to be regarded as directory, and what, being prescribed for the protection of the rights of the citizen, are to be treated as imperative. Mr. Blackwell's Treatise on Tax Titles is a very useful one, to both the student and the practicing lawyer.

tutional right, some difficult question regarding the right to property, or some point in medical jurisprudence, involving not only some knowledge of medicine and of physiology, but an intimate acquaintance, also, with human nature, and with the peculiarities and vagaries of the human mind?

Lord Erskine, in building up that splendid reputation as an advocate of which he was justly so proud, did not shrink from any labor or spare himself any exertion which could make more complete and ample his ability to grapple with the questions of law and of fact which he could anticipate as likely to arise in the cases he was to undertake. At this distance of time, and when it cannot be expected that our feelings should be enlisted to any considerable degree, in the questions he discussed, we read his speeches with delight, and study them as models of forensic eloquence. But we discover that they are very far from being mere appeals to the sympathies, the feelings or the passions of the men to whom they were addressed. On the contrary they were pervaded with such knowledge of the laws and constitution of his country, and he discussed the questions involved with such fullness and readiness of information, and such force of logic, that our wonder is as we read them, not that their effect was so powerful and their force of conviction so great, but that, in cases where he made the right appear so clear, it should ever have been seriously contested. We take up, for instance, the trial of Hardy, and note in what a masterly manner he handled the successive questions as they arose, and we are irresistibly impressed that the great advocate was an orator in the highest and best sense, whose aim was to come to the discussion of such great causes with his mind well stored with all the materials of attack and defense which study or labor could gather, and who so far accomplished the end sought, that he was enabled to teach a government then tending strongly toward despotic authority, a salutary and much needed lesson regarding the freedom of thought and freedom of discussion, and one which will never be unlearned while free institutions continue to be the heritage of the people of England. (x)

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(x) Lord Campbell said of Erskine's speech in support of the right of juries in the Dean of Asaph's case, that it displayed, "beyond all comparison, the most perfect union of argument and eloquence ever exhibited in Westminster hall. So thoroughly had he mastered the subject, and so clear did he make it, that he captivated, alike, old black letter lawyers and statesmen of taste and refinement."

Quintilian, who lived in an age and under a system of forensic pleading, in which oratorical powers, without solid attainments, might be made much more available than now under our system, justly ranks thorough preparation among the first and highest requisites of the advocate; or, as he expresses it, as "constituting the foundation of pleading." "Very few orators," he truly remarks, "take sufficient trouble in this respect; for, to say nothing of those who are utterly careless, and who give themselves no concern on what the success of a cause depends, if there be but points which, though wholly unconnected with the case, but relating to characters involved in it, and leading to the usual flourishes on common-place topics, may afford them an opportunity for noisy declamation; there are some also whom vanity perverts, and who (partly pretending that they are constantly occupied, and have always something which they must first dispatch, tell their client to come to them the day or the very morning before the trial, and sometimes even boast that they received their instructions while the court was sitting; or, partly assuming a show of extraordinary ability, that they may be thought to understand things in a moment, making believe that they conceive and comprehend almost before they hear), after they have chanted forth, with wonderful eloquence, and the loudest clamors of applause from their partisans, much that has no reference either to the judge or to their client, are conducted back in a thorough perspiration, and with long train of attendants, through the forum." How vivid is this picture of some advocates, still to be met with, whose endeavor is to try the parties and witnesses rather than the cause, and to display themselves rather than exhibit the rights of their clients! The applause of an unthinking crowd may be easily and cheaply excited in this manner, but sensible men

It will be interesting to quote in this connection what was said of Alexander Hamilton by one of his gifted cotemporaries: "It is rare that a man, who owes so much to nature, descends to seek more from industry; but he seemed to depend on industry, as if nature had done nothing for him. His habits of investigation were very remarkable; his mind seemed to cling to his subject till he had exhausted it. Hence the uncommon superiority of his reasoning powers, a superiority that seemed to be augmented from every source, and to be fortified by every auxiliary; learning, taste, wit, imagination and eloquence. These were embellished and enforced by his temper and manners, by his fame and his virtues. It is difficult, in the midst of such various excellence, to say in what particular the effect of his greatness was most manifest. No man more promptly discerned truth; no man more clearly displayed it; it was not merely made visible, it seemed to come bright with illumination from his lips. But prompt and clear as he was, fervid as Demosthenes, like Cicero, full of resource, he was not less remarkable for the copiousness and completeness of his argument, that left little for cavil and nothing for doubt. Some men take their strongest argument as a weapon, and use no other; but he left nothing to be inquired for more, nothing to be answered. He not only disarmed his adversaries of their pretexts and objections, but he stripped them of all excuse for having urged them; he confounded and subdued as well as convinced. He indemnified them, however, by making his discussion a complete map of his subject, so that his opponents might, indeed, feel ashamed of their mistakes, but they could not repeat them. In fact, it was no common effort that could preserve a really able antagonist from becoming his convert; for the truth, which his researches so distinctly presented to the understanding of others, was rendered almost irresistibly commanding and impressive by the love and reverence which, it was ever apparent, he profoundly cherished for it in his own." (y)

In America we meet with few cases of lawyers of high standing and eminent ability who give themselves exclusively to the defense of criminal cases, and few of that class would find employment sufficiently steady and remunerative if they desired to do so. The criminal lawyer is too apt to be a man who is tainted somewhat by his associations, and who fits himself for defending vile characters by imbibing more or less of their vicious tastes and habits. But the ablest counsel may be called sometimes to step from the highest tribunal in the land into the criminal court; as Daniel Webster was called in to assist in bringing a criminal to justice, and William H. Seward to save a demented negro from the punishment of a criminal. And while we say of the preparation for such cases, that it must be begun early, on broad and deep foundations, we should add also, that mere rhetoric in the lower

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estimate such advocates at their true value, and juries are seldom much influenced by them, while courts only endure them. On the other hand, commendation like that which Lord Mansfield gave the counsel in *Sommersett's case* is worth striving for; not for the compliment merely, but because he who has once earned it may rely afterward upon having the ear of the court, and upon being looked to by the judges for instruction and assistance when the mere declaimer would be heard but not heeded. "I cannot omit," said he, "to express particular happiness in seeing young men, just called to the bar, have been able to profit so much by their reading." It was a different class of practitioners that Chief Justice Gibson was listening to when he congratulated himself on having achieved a great judicial triumph, inasmuch as he was able to keep his eye upon a dull advocate while his mind was occupied with more agreeable objects!

(y) Works of Fisher Ames, vol. 2, p. 260.

and more common acceptance of that term,—the power to control the voice, to use readily beautiful or ingenious figures of speech, and to accompany them with appropriate gestures—constitutes but a small part of this preparation. The most perfect address in point of oratorical accuracy may fall dead and lifeless, or even be the subject of ridicule, in an important criminal cause, when a plain and straightforward argument, made upon full preparation, but without attempt at display, will lead the minds of court and jury irresistibly to the advocate's conclusions. (z) The caution above all others which the student needs, when he feels himself gifted with fine oratorical ability, is to beware lest he find himself relying upon it too exclusively, and neglecting that hard labor which the less gifted would be compelled to perform, but the benefit of which is always in proportion to the natural powers which it supplements. (a)

The innovations which have been made in criminal procedure in modern times have been so great that a trial on a charge of crime now bears as little resemblance to one in the time of the Stuarts, as the service in a Christian church does to the heathen sacrifice to idols. We have at last, we think, so moulded and shaped the criminal practice as to give the prisoner the full benefit of the maxim that he shall be presumed innocent until proved guilty; which in former times was but a mockery. But some of the new protections devised for innocence need to be carefully guarded to prevent their proving delusive snares. It has been thought—for an instance—that the old practice under which the accuser's story could be heard by the jury, but not that of the prisoner, was unphilosophical and even barbarous, and in some of the states the rule has been established by statute, that whoever possesses knowledge of the facts shall be heard, and the jury shall judge of the reasonableness of his story, and to what extent any interest he may have in the result ought to affect his credibility. This innovation has been opposed on two grounds, 1. As dangerous to public justice, inasmuch as every accused party will exonerate himself by his evidence, however falsely; 2. As dangerous to the prisoner, inasmuch as the permission to give evidence is equivalent to a command, because if he fails to testify his conduct will be subject to the worst construction; and in this way we in effect establish an inquisitorial trial, and deprive accused parties of the benefit of the constitutional maxim that no man shall be compelled to give evidence against himself. (b) To

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(z) Luther specifies among the requisites for a good preacher: "First, he should teach systematically; secondly, he should have a ready wit; thirdly, he should be eloquent; fourthly, he should have a good voice; fifthly, a good memory; sixthly, he should know when to make an end; seventhly, he should make sure of his doctrine; eighthly, he should venture and engage body and blood, wealth and honor, in the word; ninthly, he should suffer himself to be mocked and jeered of every one." Every one of these is equally important in the criminal lawyer, and some of them are indispensable. He must "make sure of his doctrine;" "he should know when to make an end;" he should enlist heart and soul in the cause; and if public opinion runs strong and fierce against his client, he must "suffer himself to be mocked and jeered of every one," rather than allow to be sacrificed the interests of one who has confided reputation, liberty, perhaps life, to his protection. The calm future must be trusted to set him right, and *if he never quails before the clamor*, the trust will not be disappointed.

(a) All of Sheridan's speeches, which so glow and sparkle now as if they were the spontaneous outbursts of genius, were in reality the results of the most persevering labor. The wonderful power of extemporizing on the part of the elder Pitt, is said to have been the result of severe training at Oxford, and after he entered parliament, he was content to delay addressing the house until after he had thoroughly studied it, and understood the audience he was to speak to.

(b) This view has been put forth in one of the magazines by Mr. Francis Wharton. It is believed, however, that, where the new law has been tried, the result has generally proved

deal properly with such changes, the lawyer ought to be familiar, not only with the old law, and with the reasons on which it rested, but also, with the concurrent principles incidentally affected by the change, that he may know how to administer the new law so as to save to his client all the old rights while giving him the benefit of the new privilege. Suppose—to illustrate again—the accused party takes the stand and makes his statement, and then refuses to be cross-examined upon it; has he a *right* to stop where pleases, and to claim his constitutional right not to be *coerced* to give evidence against himself? If not, what remedy has the prosecution? Shall the court strike out the evidence given, or punish the party as it might an ordinary witness, for refusing to testify further? Upon such a question precedents might be of little service, but one man rising to discuss it would be full of valuable thoughts and suggestions tending to lead the court to a correct conclusion, when another who, however much he might have read, had never troubled himself with thoughtful preparation for such questions, might flounder through a long speech, the only effect of which would be to make that darker which was dark enough before.

The criminal lawyer needs to be specially familiar with the rules of evidence. In criminal cases, much more than in civil, it is important that he prevent improper evidence being put in against his client. The party defeated in a civil suit, through an erroneous ruling of the judge, has generally his full remedy when a new trial is awarded him; but a new trial to one who has unjustly been subjected to the stigma of conviction of crime is far from being a complete vindication; while to the prosecution after a wrongful acquittal, though brought about by a mistake in law on the part of the judge, there is generally no remedy. Fortunately there are good treatises on the rules of evidence, and their main and leading principles can easily be made familiar. (c)

Equity law is a great stumbling block to many students, and there are not wanting those who have supposed it might be legislated out of existence. But although the division lines between law and equity have been broken down in some states, so far as concerns procedure, yet the codes which abolish distinctions of form do not do away with the principles, for the administration of which the old forms were designed; and consequently works like Jeremy on Equity, Spence's Equitable Jurisdiction, Adams's Doctrine of Equity, and Story's Equity Jurisprudence, are as important and indispensable now, in all the states, as they ever were. Whether or not, therefore, he expects to practice in a state where the old forms are retained, the student must read equity, and if he finds it prove unattractive, there is all the greater reason why he should attack it with energy and perseverance. But if

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satisfactory, and that many men, wrongfully or mistakenly accused, have been enabled under these statutes to give to the jury such explanations as removed all suspicions, when, had their mouths been closed, their condemnation would have been inevitable. There are unquestionably some difficulties in the case; but the rule of the common law, which permitted the accuser to be heard but not the defendant, resulted sometimes, beyond any question, in the conviction and punishment of the wrong party, because the party really guilty had been allowed, or been able, to make the first complaint.

(c) There is, of course, much upon the subject of evidence in the treatises on criminal law, and Roscoe's Criminal Evidence is a useful work. Of the treatises on evidence, Greenleaf is, perhaps, most used, the first volume being especially valuable. Starkie's is also an excellent work, and a new edition of the first volume, which gives the general principles, has recently been issued in this country. Phillips's Evidence, including the notes by Cowen, Hill, and Edwards, is much more full in its references to cases than either of the others, though not so satisfactory for the student.

approached in that manner it will not prove unattractive. On the contrary, the student will soon find himself reading, with admiration and pleasure, what at first appeared a confused collection of arbitrary rules, as he perceives how admirably equity supplements the law, and how peculiar is the adaptation of its remedies to the wrongs to be prevented, or the evils to be redressed.

Nor are the works on common law pleading superseded by the new codes which have been introduced in so many of the states. A careful study of those works is the very best preparation for the pleader, as well where a code is in force as where the old common-law forms are still adhered to. Any expectation which may have existed, that the code was to banish technicality and substitute such simplicity that any man of common understanding was to be competent, without legal training, to present his case in due form of law, has not been realized. After a trial of the code system for many years, its friends must confess that there is something more than form in the old system of pleading, and that the lawyer who has learned to state his case in logical manner, after the rules laid down by Stephen and Gould, is better prepared to draw a pleading under the code which will stand the test on demurrer, than the man who, without that training, undertakes to tell his story to the court as he might tell it to a neighbor, but who, never having accustomed himself to a strict and logical presentation of the precise facts which constitute the legal cause of action or the legal defense, is in danger of stating so much or so little, or of presenting the facts so inaccurately, as to leave his rights in doubt on his own showing. Let the common-law rules be mastered, and the work under the code will prove easy and simple, and it will speedily be seen that no time has been lost or labor wasted in coming to the new practice by the old road.

A large and increasing proportion of those who come to the bar in America do so by way of the law schools. There is an advantage in that course in the fact that an *esprit du corps* is cultivated among those who gather there, which tends to a high code of professional ethics, and at the same time to a more careful study of the law as a science than is apt to be made in the law offices, where each particular question is investigated with some reference to the compensation which should follow. The advice of Gridley to John Adams was, "to pursue the study of the law rather than the gain of it: pursue the gain of it enough to keep out of the briers, but give your main attention to the study of it."<sup>(d)</sup> Fisher Ames said of Hamilton: "As a lawyer, his comprehensive genius reached the principles of his profession; he compassed its extent, he fathomed its profound, perhaps even more familiarly and easily than the ordinary, rules of its practice. With most men law is a trade; with him it was a science."<sup>(e)</sup> The same was true also of Pinkney and of Choate; the two greatest advocates perhaps that America has yet known. The industry of Choate was wonderful, but it was directed, not to the acquisition of money, but to the mastery of the law; and of Pinkney it was said that his speeches always "smelled of the lamp," but, nevertheless, they were a perpetual delight to those

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<sup>(d)</sup> Works of John Adams, II, 46. "His advice," says Mr. Adams, "made so deep an impression on my mind, that I believe no lawyer in America ever did so much business as I did afterward, in the seventeen years that I passed in the practice at the bar for so little profit." *Pecuniary* profit he means; for this study and practice were the foundation of his immortality.

<sup>(e)</sup> Works of Fisher Ames, vol. 2, page 260.



who heard them. The learned man cannot well be dull when speaking of the science he has mastered. All men, said Socrates, are eloquent in that which they understand. Another advantage derived from the law schools is, that students are enabled to form themselves into clubs for the discussion of moot cases. Such clubs, well managed, afford the best possible school for the cultivation of forensic eloquence. Some experience in extempore speaking every young man ought to have before coming to the bar, and if he begins his practice without the discipline it would give, he cannot be certain that timidity and embarrassment will not overcome him at the outset of his career. Few men are Erskines and Patrick Henrys, gifted with powers which make their first essay a triumph; the first efforts are, almost necessarily, mortifying failures, and unless they are made in these little societies, and the difficulties mastered before the public become the audience, a man must have great native strength of purpose and power to endure scoffing and ridicule, or shame and mortification may draw their veil around him, and shut off forever his ambitious hopes and bright visions of professional eminence. Now and then a Demosthenes or a Curran will come, who will brave the ridicule and endure the mortification until repeated efforts have enabled him to conquer his natural defects and natural timidity; but every young man is not enabled to feel with the same confidence that they did, "it is in me, and it shall come out;" and one mortifying failure, not in the presence of a select company of friends, but before a public audience, a part of which is adversary in feeling, and includes rivals interested to make the most of the embarrassment, is sometimes sufficient to destroy the hopes of a life. Self-confidence the advocate must acquire; and, in order that he may possess it, he must first have the necessary knowledge, and secondly, he must have tried his powers until he is certain of them.

There is also an advantage in these societies, in that they enable their members to practice in the preparation of pleadings. The discussion of most cases ought to be preceded by as careful an issue as would be formed in an actual suit at law; and the benefit of this discipline is so great that it should never be neglected. It accustoms one to a critical and accurate use of language; and it gives one an insight into the application of the rules of pleading not easily acquired except by practice. The same care which one would expend in the preparation of the brief, ought to be employed on this preliminary proceeding; the purpose being the same in both cases—to give the mind a needful discipline. The briefs drawn up for the argument ought to receive an equally conscientious attention. They ought to be logical and accurate, neat and lawyer-like. It is impossible to make a logical argument based upon a brief in which the points are stated with a slovenly want of precision, and the authorities arranged without logical order. Slovenly habits, whether pertaining to person, to study or to practice, are most dangerous in student life, because they tend to grow upon one until they obtain the mastery. In the argument of these cases, precision of language, especially in the statement of legal definitions and principles, is of far more importance than beautiful figures of speech, and is to be cultivated rather than a showy style. A legal point well-stated is half argued. These societies are useful, also, as inducing a taste for investigations in fields a little aside from technical law, and yet having an important purpose in connection with its study. Political and international questions enlarge the mind and open the under-

standing of the lawyer, and fit him for the discussion of the great questions with which it will be his ambition afterward to become connected. What a field was opened before the student in the new questions of law and government growing out of the recent civil war! What questions in domestic politics, as well as in international law, still remain to be discussed, sifted, tested and settled! We do not mean the questions of party politics, which are so often questions of low political strategy; for these, to the young lawyer, are a delusion and a snare, when he allows his mind to be possessed by them, and his taste to be perverted to a longing for party positions and honors. John Adams has well said that party is a tyrant. "At the bar \* \* is the scene of independence. Integrity and skill at the bar are better supporters of independence than any fortune, talents or eloquence elsewhere. A man of genius, talents, eloquence, integrity and judgment, at the bar, is the most independent man in society. Presidents, governors, senators, judges, have not so much honest liberty; but it ought always to be regulated by prudence, and never abused." (f) High attainments are essential to this independence; and political positions are never of real honor, and always contemptible when, instead of being an award to eminent fitness, they are acquired by self-seeking, by becoming a party hack, and by imbibing and displaying all the party bigotry and party animosities of the day. This bigotry and these animosities are not generally strong in such societies; and, with proper views of the true province and value of parties, they will be frowned upon and discouraged, and the feelings kept under control, so that questions can be discussed upon their merits, instead of being viewed from the standpoint of prejudice. These societies, also, become associations of friends, who, if chosen with prudence, and with due regard to their acquirements, habits and tastes, are able to be of service to each other in many ways, besides the drill they give in the contact of mind with mind in these set discussions. Mr. Warren, in his *Law Studies*, has emphasized the importance to a student of being prudent in the selection of his associates; and quotes Roger North, that "a student of the law hath more than ordinary reason to be curious in his conversation, and to get such as are of his own pretension, that is, to study and improvement; and I will be bold to say, that *they shall improve one another by discourse as much as all their other study without it could improve them.*" This may be thought somewhat extravagant; but the statement could be easily fortified by the opinions of many other men of eminence, if space would admit, and if examples were deemed necessary to impress upon the mind the importance of suitable and intelligent associates. But, whatever may be his associations, or wherever he may pursue his studies—whether in the law school or in the office of the practitioner—the great fact to be borne in mind by the student is, that he is to become a lawyer, if at all, not so much by committing to memory the technical terms and rules of the science, as by mastering its philosophy, whereby alone he can fit himself to give its principles practical application.

It has not been our purpose in these preliminary pages to mark out a full course of law reading, or to prescribe a list of law books which should or should not be read by the student. There are difficulties in doing so which seem to render the attempt, in a work of

this character, undesirable. New treatises upon different branches of the law are being constantly published, and the latest, if prepared with equal ability, is generally the best, because it gives us the result of the latest cases, and the changes in the common law which new inventions and new modes of transacting business are constantly introducing. A list of books to be read soon becomes imperfect, and needs revision. Moreover, a full course of law reading is one which cannot be completed in the time usually taken by the student before admission to the bar, and to present him with such a course without indicating which portion he must read while a student, and which he may postpone till he comes to the bar, is to render him but little assistance. Every student is supposed to have some preceptor who is competent to give the proper information regarding text-books, and upon whose advice he can depend in their selection. In these prefatory remarks, our aim has been only, *first*, to impress upon the mind of the young gentleman about to enter this noble but very laborious profession, the importance of thoroughly mastering the rudiments of the law before he undertakes to assist in its administration, and, *second*, to give him a few hints that shall induce him to employ properly his reason and reflection, and not make useless expenditure of time and energies in his pursuit of legal attainments. (*g*)

Any advice which prescribes a course of labor for students is imperfect if it fails to inculcate the importance of seasonable rest. The rest is equally needful with the labor, and it is not uncommon to find it more difficult to convince the person requiring it of his need. It is a law of nature not less than of revelation that for a seventh part of the time the ordinary avocations of life shall be suspended, and no man is more certain to be visited with the penalties for a breach of this law than he who is engaged in intellectual pursuits. Every man is held in "the manacles of this all-binding law." If he persists in his labors for seven days in the week instead of taking the commanded rest, he is doubly punished; first, in the weariness and loss of physical and intellectual strength and vigor which must follow; and second, in discovering at length that the seven days labor are not so productive as the six would have been with the proper rest. But constant attention

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(*g*) Mr. Jefferson marked out a course of reading for students of the law, which is worthy of attention, as the result of the reflections of a great mind, and because, also, it was the course followed by his two distinguished friends, Madison and Monroe. Having laid the proper groundwork—in which he included a knowledge of mathematics and the natural sciences—he says to the student: "You may enter regularly on the study of the law, taking with it such of the kindred sciences as will contribute to eminence in its attainment. The principal of these are physics, ethics, religion, natural law, belle lettres, criticism, rhetoric and oratory. The carrying on several studies at a time is attended with advantage. Variety relieves the mind as well as the eye, pallied with too long attention to a single object, but, with both, transitions from one object to another may be so frequent and transitory as to leave no impression. The mean is therefore to be steered, and a competent space of time allotted to each branch of study. Again, a great inequality is observable in the vigor of the mind at different periods of the day. Its powers at these periods should therefore be attended to, in marshaling the business of the day." He therefore recommended that the student appropriate his time each day as follows:

Till eight o'clock to the natural sciences, ethics, religion and natural law.

From eight to twelve to technical law.

From twelve to one to government, general politics, and political economy.

In the afternoon to history.

From dark to bed time to belle lettres, criticism, rhetoric and oratory. [Randall's Life of Jefferson, I, 53.]

An admirable course in its general outlines, though the books he recommends are in great part superseded now by later publications.

for six days in the week to a single pursuit will soon prove exhausting. We have seen that Mr. Jefferson advised that only four hours a day should be given to technical law, and that the remaining hours should be devoted to other studies calculated to improve and strengthen his understanding. Mr. Choate recommended students to give six hours each day to the law; four to reading, and two to thought and reflection. It is easy to injure the health by incessant application, and easier still to keep the mind in that state of jaded and listless indifference in which half the labor of study will be expended in fixing the attention. History and belle lettres learning, and the natural and abstract sciences are an agreeable and healthful relief from the continuous study and contemplation of the principles, proceedings and forms of law, and they become a relaxation and an enjoyment, at the same time that their pursuit is storing the mind with abundant and available resources for the great occasions which now and then will test to the full the advocate's capacity. The best industry is that which divides most judiciously the time to be appropriated, so that the labor in each portion will be performed with alacrity and ardor, and without any waste of energy. But even a variety of studies should not occupy the attention beyond reason. Physical exercise and physical and mental rest must be provided if one would have either physical or mental strength. A due allowance for sleep, a due attention to social intercourse and current intelligence, are as needful to round out and complete the perfect lawyer as the patient labor which he must devote to the sages of his profession.

And in all his studies the law student must not forget that he is fitting himself to be a minister of justice; and that he owes it to himself, to those who shall be his clients, to the courts he shall practice in, and to society at large, that he cultivate carefully his moral nature to fit it for the high and responsible trust he is to assume. The temptations of dishonest gain and the allurements of dissipation are all the time leading to shame and ruin, from the ranks of our profession, a long and melancholy train of men once hopeful, perhaps gifted; but the true lawyer is pure in life, courteous to his associates, faithful to his clients, just to all; and the student must keep this true ideal before him, observe temperance, be master of his actions, and seek in all things the approval of his own conscience, if he would attain the highest possible benefit from the STUDY OF THE LAW.

The main purpose in giving to the public a new edition of the Commentaries of Blackstone, was to present the changes in the law which had taken place since the last preceding edition appeared, that the reader, while informing himself concerning the law of England of a century since, might not be misled in respect to its present condition. With this object before him, while avoiding the detail which might be useful to the English practitioner, but which would merely cumber the pages for American use, the editor has sought to indicate the statutory changes sufficiently to give a general idea of the advancement made in the English law since our commentator's time, and also to enable the American student to compare the law of his own country with the system from which it was derived, as modified by the experience of another land enjoying free institutions under circumstances and with a state of society considerably differing from our own.

How far it was desirable to preserve the notes to the previous English editions, or to add thereto, was a question not easy of proper solution. The editor is fully aware that in some previous editions the proper province of an editor was exceeded, and that the additions made, instead of being proper notes to the text, were in the nature of digests of the law upon very many of the questions which the text had discussed or alluded to. This was especially the case with the edition of that voluminous and industrious writer, Mr. Chitty, some of whose notes are a mine of information, almost making the work a library in itself, and which, nevertheless, were not more peculiarly appropriate to these Commentaries than they would have been to any other legal treatise which made general reference to the same subject-matter. Some of these notes, moreover, have wholly, or in part, become obsolete, and others related to branches of the law, or to questions, with which the lawyer in America has no occasion to deal.

The editor was of opinion, however, that there was too much in Mr. Chitty's annotations of substantial and permanent value to warrant their being entirely discarded, and that while the student, or the gentleman who reads only for general or political information, may have little occasion to employ himself with them, the practicing lawyer, who shall make use of the work, will be gratified to find so much retained that is convenient and useful in his practice. But whatever has become obsolete, whatever, like most of the notes upon the law of tithes and of copyholds, is unimportant in America, has been cut away with unsparing hand, that time and attention might not be uselessly occupied in exploring it. The quantity of matter thus rejected was very large, and those who have occasion to make much use of the work will be thankful to get rid of it.

What is new in this edition has been added in the same spirit that has governed the selections from the English notes. As students make more use of the work than practicing lawyers, their information and benefit have been kept mainly in view, but references have been made to the judicial decisions on many practical questions, and it is hoped they will be found not without their convenience to the profession generally.

The English notes which have been retained are inclosed in brackets to distinguish them from the new additions. The names of their authors are given in some cases where individual opinions are expressed, but generally it has not been thought important to distinguish their sources, and in some cases, where editors have combined with their own the labors of their predecessors, it would have been difficult to do so.

The analysis given of the contents is a considerable enlargement of that of Baron Field, and it is believed that, if judiciously used, it will answer the purpose for interrogating students better than the lists of questions sometimes given, and which require the memory to be burdened equally with matter important and unimportant.

The table of abbreviations embraces the legal authorities, and also other books which the reader might possibly desire to refer to, and which are not sufficiently described or indicated by the context.

THOMAS M. COOLEY.

ANN ARBOR, *Sept.*, 1870.